

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

CORRECTED COPY

76-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:	
	:	
Appellee,	:	
	:	
- v -	:	Docket No. 76-1495
	:	
ROBERT VOULO,	:	
	:	
Appellant.	:	

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BRIEF FOR APPELLANT ROBERT VOULO

Appeal from A Judgment Of
Conviction In the United
States District Court For
The Eastern District Of
New York

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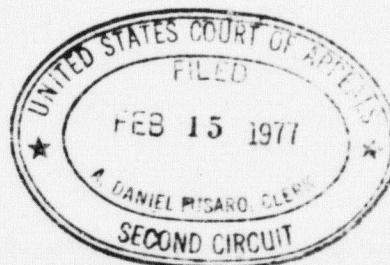


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BRIEF FOR APPELLANT ROBERT VOULO

Robert Voulo appeals from his conviction of October 15, 1976 in the United States District Court for the Eastern District of New York (Mishler, J.), upon a jury verdict of one count of violating the anti-gambling statute, 18 U.S.C. 1955. He received a prison term of two months followed by 34 months probation. Service of sentence has been stayed pending appeal. Counsel is assigned under the C. J. A.

Eight other defendants are part of this same appeal. Several are treating issues common to Voulo in their Briefs. We shall not re-canvass their arguments. Our Brief will, where appropriate, incorporate by reference co-counsel's discussion and then demonstrate its application to Voulo.^x

^x The issues on this appeal have been discussed extensively with counsel for co-defendants. Also drafts of the Briefs of most of them have been reviewed.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to suppress conversations of Voulo, and others implicating Voulo, resulting from wiretaps and bugs at Apartment 309, 8-15 27th Avenue, Astoria Queens and co-defendant Scafidi's Howard Beach home?
2. Whether the district court erred in refusing to suppress similar conversations resulting from bugs at the HiWay Lounge, Brooklyn, New York?
3. Whether the district court erred in refusing to grant Voulo a severance after it dismissed the Government's "single conspiracy" count?

STATEMENT OF FACTS

Voulo's trial resulted from a massive Strike Force effort against gambling operations allegedly headed by Napoli Sr. and his son Napoli Jr. On the claim of a single conspiracy the Government joined for trial twenty defendants and proved illegal gambling at different operations in Brooklyn, Queens, Yonkers and New Jersey at various periods during 1971 to 1975. Voulo was involved in Brooklyn and Queens, the Government insisting that he started in 1971 as a runner for his stepfather Scafidi and uncle, Martin Griffen Jr., (Voulo was then eighteen) (5997)^x

^x Numbered references, unless otherwise specified, are to the trial transcript. "A" denotes the Joint Appendix for Appellants.

and found his way up to controller (6081), even working directly with Napoli Sr. at the HiWay Lounge (6091-93).

Police surveillance and searches and seizures accounted for part of the Government's evidence. At least as to Voulo, however, there was still room for conflicting inferences and the seizures and surveillance might not have been enough to convict. Real damage came from a wiretap on Scafidi's Howard Beach home, which was part of an order for a tap also at Apartment 309 in Astoria, Queens; and to a lesser but still significant extent from a bugging device at the Napolis' HiWay Lounge in Brooklyn. We mention these here because, as the Court will see later, all the taps and bugs should have been suppressed and the district court's failure to do so is fatal to the conviction.

We summarize now the thrust of the Government's evidence against Voulo. At the end of the Statement we show how it fit into the different counts of the indictment.

The June 1971 and May 1972 Searches

On June 16, 1971 New York City police officers, pursuant to a search warrant, broke into 405 Eldert Lane, Brooklyn and found Voulo, Griffen and Scafidi (4411), gambling records and adding machines and calculators (4412-13). Voulo had a black briefcase with policy slips, controller ribbons, and collection charts (4411, 4414).

Another Brooklyn search, this one by federal agents,

occurred about a year later (May 1, 1972) at 967 East Second Street after the Government had surveilled various defendants at the premises, including Voulo (e.g., 1161, 1844). Voulo, Griffen and a friend Mustaccio were in the basement (1126) together with office supplies (244), an adding machine and calculator (245) and manila folders which were later found to contain Voulo's fingerprints (4030-31).

The Apartment 309 and Howard Beach Taps

On December 8, 1972 Judge Judd of the Eastern District authorized a bug for fifteen days at Apt. 309, 8-15 27th Avenue, Astoria Queens (A 237). Judge Weinstein authorized another one later on. Using evidence of gambling gathered from the bugs, including of Voulo's involvement, the Government obtained an order on February 20, 1973 from Judge Rosling for taps on the Apt. 309 phone and another at Scafidi's Howard Beach home. Voulo was a named subject in that order.

Voulo incriminated himself in conversations on the Howard Beach phone (e.g. 2/28/73, Tr. 2711-14; 3/3/73, Tr. 2726-31; 3/7/73, Tr. 2740-42a)^x and there were incriminating references to him in conversations by others (e.g. 2687, 2748-49).

^x Since the Government will not challenge our point that the tapped conversations were directly incriminating we have not seen any need to include the texts in the appendix.

In addition to the Apartment 309 and Howard Beach taps the Government bugged the Hiway Lounge (allegedly used by the Napolis as headquarters for their gambling operations) pursuant to three different orders (e.g. A 274). Voulo was a named party to the last orders here as well. He was identified as talking with Napoli Sr., DeLuca, Mascitti, Di Matteo and others on May 11, 1973 (5462, 5512, 5540), and on April 18, 1973 with Napoli Sr. (3486). In the last conversation Napoli said that certain workers hadn't been paid, Voulo replied that they had (3493), and the conversation went on at length about the same subject (3493-94).

Indictment and Trial

The Government eventually went to trial in July 1976 on a four count indictment. Earlier the district court struck several other counts, but reversal by this Court, 542 F. 2d 104 (2d Cir. 1976), came too late to re-include those counts by the July 6 starting date even if the district court had been inclined to do so. Voulo was named in all four counts. The first (which is found as Count Two in the superseding indictment, A21), arose out of the May 1972 search at East Second Street (and the prior surveillance) and charged a policy operation from March to May, 1972. The Government showed the June 1971 search at Eldert Lane as a prior similar act. The jury convicted Voulo on this count.

The second (superseding indictment Count Three A21) covered

December 1972 - March 1973. The evidence all came from the Howard Beach and Apartment 309 electronic surveillance. The jury convicted four of the five defendants charged in that count, including Voulo, but the district court set aside the conviction. The statute required that five or more conduct the business and the jury's acquittal of one of the defendants meant the Government, on that count, proved only four.

The third Count (superseding indictment Count Four A22) was the HiWay Lounge operation. The jury convicted the Napolis and others, but acquitted Voulo.

The last Count (superseding indictment Count Seven A 23) charged a broad conspiracy. With it in the case the Government was able to introduce proof of operations in New Jersey, Yonkers and elsewhere by various defendants, all allegedly headed by Napoli Sr., without allocation as between substantive and conspiracy (A 172). The district court dismissed that count (and several defendants as well) as the close of the Government's case because the Government failed to prove that the multitude of operations were part of a single conspiracy (A 148). The court, however, denied severance motions by Voulo and others (A 160-61) although they had clearly been prejudiced by proof the court now held should never have come in (A 153).

Voulo's Defense

The crux of Voulo's defense was his relationship to Griffen and Scafidi. Scafidi was his stepfather (1261) and resided a

short distance from him in Howard Beach. Griffen was his uncle. Griffen's girlfriend resided at East Second Street. Those were the premises involved in the May 1972 search, and the basis of the Count Two conviction (1027, 6093). Voulo's presence with Griffen when the search took place was, therefore, arguably a nephew's visit with his uncle to the latter's girlfriend. The argument was re-enforced by the fact that several weeks after the East Second Street raid, when the policy bank was clearly no longer there, agents observed Griffen and Voulo motorcycle from Howard Beach to the East Second Street residence and then leave the house with two girls for Voulo's aunt's house in Bay Ridge (1022-25, 1029, 1032). True, Voulo had been found with Griffen and Scafidi at Eldert Lane in June 1971, but that, it could be argued, was a year earlier, he had been punished in the State Courts for it, and by May 1972 he had learned his lesson.

It became impossible to sustain these arguments (which were vigorously urged at trial, 6244-49) in the face of the Howard Beach and HiWay Lounge taps and bugs, as the Government let the jury know on summation (6029, 6031, 6033, 6058-59, particularly 6070-77, 6089-94) and on rebuttal summation (6676-77 6685-86).^x

^x Although the jury may have found Voulo's HiWay Lounge involvement insufficient to sustain a conviction on the HiWay Lounge Count, it still could use the HiWay Lounge conversations as evidence of guilt on the other counts.

ARGUMENT

THE APT. 309, HOWARD BEACH AND HIWAY
LOUNGE TAPS AND BUGS SHOULD HAVE BEEN
SUPPRESSED. VOULO'S SEVERANCE MOTION
FOLLOWING DISMISSAL OF THE CONSPIRACY
COUNT SHOULD HAVE BEEN GRANTED

There are three reasons why Voulo's conviction cannot stand. Any will suffice for reversal. In addition we rely on all points of other appellants to the extent applicable.

1. The district court should have suppressed the results of the Apartment 309 and Howard Beach bugs and taps. The Brief for Appellant Mascitti gives the grounds, principal among them the surreptitious and illegal entry without authorization; but the lack of probable cause, failure to seal, failure to file reports and other procedural defects defeat the Government as well. Mascitti's arguments apply to Voulo.^x

2. The district court should have suppressed the results of the HiWay Lounge bugs. Here it is Napoli Sr.'s Brief which sets forth the reasons (principal among them again the surrep-

^x The 309 bugged conversations included references to "'Bobby'", whom the agents identified as Voulo (1/19/73 letter, Malone to Denis Dillon). This in turn led to the February 20 order for the 309 and Howard Beach phone taps, naming Voulo as a subject. As an aggrieved person on the taps (18 U.S.C. 2518), Voulo could challenge the legality of the bugs which tainted the taps. Alderman v. United States, 394 U.S. 165 (1969). United States v. Wac, 498 F. 2d 1227 (6th Cir. 1974). He had a similar right to challenge the HiWay Lounge bugs, since again the Government used the results of the 309 taps to show probable cause. See also United States v. Hinton, 2d Cir., September 27, 1976, p. 5693 n.11.

titious and illegal entries without court order) although we refer as well to Mascitti's Brief, including its discussion that the illegality of the 309 material tainted the HiWay Lounge bugs as well.

3. The district court should have severed Voulo from the Napoli Sr. trial once it determined that the Government had not proven the single conspiracy. Our situation is slightly different from Napoli Jr., on whose discussion we rely in this regard, because Voulo was named originally in each of the substantive counts tried (A 21-22) whereas Napoli Jr. was not. See United States v. Ong, 2d Cir., September 14, 1976. The basic problem, however, as the Mascitti Brief on this point makes clear, is the same: by reason of the faulty conspiracy count the Government was enabled to join Voulo (who could probably have been tried in two days) with twenty other defendants in a mass conspiracy trial of six weeks, showing vast illegal operations, among them in Yonkers and New Jersey, with which Voulo had nothing to do. Compare United States v. Bertolotti, 529 F. 2d 149 (2d Cir. 1975) (re-iterating repeated warning by the Second Circuit against mass conspiracy trials) with United States v. Miley, 513 F. 2d 1191. (2d Cir. 1974) (refusal to reverse only because trial was short, defendants were few, and testimony was basically the same for all defendants). Here the district court was alerted long prior to trial of the prejudice problem (A 79). It opted to wait and

see whether there was in fact a single conspiracy.^x At the close of the Government's case, the "'real question'" had been resolved for defendants (A 148) so that severance should have followed.^{xx} The district court thought it could get the jury to strike the weeks of prejudicial testimony from its mind (A 153). However its instructions on this point could not have been intelligible to anyone (A 165-71), no less a jury whose inability to grasp the district court was proven by its conviction of Voulo on Count Three when it had been told there could be no conviction unless five defendants were held in, and the jury held in only four.

The prejudice was worse, moreover, because the Government would not let go. Even with the conspiracy count out and the evidence as to Jersey and Yonkers stricken (e.g. A 166) it insisted on referring to that evidence in asking the jury to convict. Brief for Napoli Jr., pp. 21-22. See also United

^x Decision of December 23, 1975 denying severance (A 80); "The real question is whether the conspiracy charged is a single crime or multiple crimes. Defendant's moving papers show nothing to indicate that the gambling conspiracy charge here involves more than one gambling business (although the evidence in the trial may support the argument made here)."

^{xx} In dealing with the Government's abuse of the mass conspiracy format, this Court sometimes holds that the existence of a single conspiracy is ordinarily a jury question. It will not inquire into prejudice where the jury could have decided that issue adversely to defendants. See e.g., United States v. Arredo-Sarmiento, 2d Cir. October 28, 1976, Slip Op. p. 309. Here there was no basis on which a jury could have found a single conspiracy, as the district court held.

States v. Ong, supra.

We conclude with a point on harmless error, which the Government invariably argues. We know this Court has found harmless error notwithstanding improper joinder and resultant prejudice where on the Government's untainted evidence the only conclusion a reasonable jury could reach was one of guilt. United States v. Ong, supra. In Ong and cases like it, however, there was evidence of guilt beyond a reasonable doubt in uncontrovertible untainted evidence (in that case recorded conversations of defendant bribing immigration agents). Here the strongest evidence was the tainted evidence (the taps and the bugs), with the valid evidence very much controverted. Harmless error therefore has no place.

CONCLUSION

This Court should reverse Voulo's conviction. It should order severance, and then a new trial at which none of the taps or bugs may be used.

Respectfully Submitted
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U.S. v. Robert Voulo, No. 76-1495

Certificate of Service

I certify that on February 15, 1977 I mailed one copy of the Corrected Copy of the Brief for Appellant Robert Voulo to Michael E. Moore, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044, and one copy to counsel for each of the other appellants at the addresses heretofore designated by them.

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